Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

_____ Term, 1979

No. 78-1198

LAWRENCE VICTOR MILLER, aka LARRY MILLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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JURISDICTIONAL STATEMENT

Petitioner Lawrence Victor Miller aka Larry Miller (hereinafter "Miller") respectfully prays that a Writ of

Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered November 13, 1978, Petition for Rehearing and for Rehearing In Banc denied January 3, 1979, which opinion affirmed the decision and sentence of United States District Court for the Eastern District of California at Fresno, California.

OPINIONS BELOW

The opinion of the United States of the Court of Appeals for the Ninth Circuit is not yet officially reported, and a true copy of same is set forth in the Appendix filed concurrently herewith. Also contained in the Appendix are the Orders of the Ninth Circuit Court of Appeal denying Petitioner's Petition for Rehearing;

and denying Petitioner's Motion for Stay of Mandate pending Application for Certiorari. The order and sentence of the Federal District Court for the District of California at Fresno is unreported.

JURISDICTION

The date of the judgment sought to be reviewed is January 3, 1979, being the date on which the Ninth Circuit's Order denying Petitioner's Petition for Rehearing was entered. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Where the defendant in a criminal contempt proceeding stipulates to each and every element of the offense, and where the stipulation constitutes an

admission to the violations, is the District Court required as a matter of constitutional law to comply with the provisions of Rule 11 of the Federal Rules of Criminal Procedure?

2. May a district court base its sentence and fine in a criminal contempt proceeding upon unsubstantiated hearsay allegations contained in a presentence report of widespread criminal conduct?

3. May a district court, in imposing penalties for contempt of judicial orders, disregard the statutory penalty for essentially the same conduct?

4. May a district court in a criminal contempt proceeding both sentence and fine the defendant for engaging in a course of conduct violative of the district court's order?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional provisions:

Amendment Five

No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; . . .

Amendment Six

In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment Eight

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

This case involves the following statutory provisions:

Title 18 U.S.C. §401

A court of the United States shall

have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as--

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Title 18 U.S.C. §402

Any person, corporation or association willfully disobeying any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia, by doing any act or thing therein, or thereby forbidden, if the act or thing so done be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed, shall be prosecuted for such contempt as provided in section 3691 of this title and shall be punished by fine or imprisonment, or both.

Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine

to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months.

This section shall not be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law.

Section 203(c) of Part II (The Motor Carrier Act) of the Interstate Commerce Act, 49 U.S.C. §303(c) [revised at 49 U.S.C. §10921]

. . . [N]o person shall engage in any for-hire transportation business by motor vehicle, in interstate or foreign commerce, on any public highway or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing such transportation, ...

Section 222(b) of Part II of the Interstate Commerce Act, 49 U.S.C. §322(b) [revised at 49 U.S.C. §11702(a)(4)]

If any motor carrier or broker operates in violation of any provision of this part (except as to the reasonableness of rates, fares, or charges and the discriminatory character thereof), or any lawful rule, regulation, requirement, or order promulgated by the Commission, or of any term or condition of any certificate or permit, the Commission or its duly authorized agent may apply for the enforcement thereof to the district court of the United States for any district where such motor carrier or broker operates. . . . The court shall have jurisdiction to enforce obedience to any such provision of this part, or of such rule, regulation, requirement, order, term, or condition by a writ of injunction or by other process, mandatory or otherwise, restraining such carrier or broker, his or its officers, agents, employees, and representatives, and such other person, or persons, acting in concert or participating with such carrier or broker, from further violation of such provision of this part, or of such rule, regulation, requirement, order, term, or condition and enjoining upon it or them obedience thereto.

Section 222(a) of Part II of the Interstate Commerce Act, 49 U.S.C. §322(a) [revised at 49 U.S.C. §11914(b)]

Any person knowingly and willfully violating any provision of this part, or any rule, regulation, requirement, or order thereunder, or any term or condition of any certificate, permit, or license, for which a penalty is not otherwise herein provided, shall, upon conviction thereof, be fined not less than $100 nor more than $500 for the first offense and not less than $200 nor more than $500 for any subsequent offense. Each day of such violation shall constitute a separate offense.

This case involves the following provisions of the Federal Rules of Criminal Procedure:

Rule 11(c), (d), (e), & (g)

(c) ADVICE TO DEFENDANT. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and

(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right to be compelled to incriminate himself; and

(4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.

(d) INSURING THAT THE PLEA IS VOLUNTARY. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the

result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.

(e) PLEA AGREEMENT PROCEDURE.

(1) In General. The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

(2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. Thereupon the court may accept or reject the agreement.

or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report.

(3) Acceptance of a Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) Time of Plea Agreement Procedure. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) Inadmissibility of Pleas, Offers of Pleas, and Related Statements. Except as otherwise provided in the paragraph, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is

not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

(g) RECORD OF PROCEEDINGS. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

STATEMENT OF THE CASE

This petition seeks review of the decision of the United States Court of Appeals for the Ninth Circuit which affirmed the conviction of Miller, and the imposition of a $100,000 fine and one year sentence, by the United States District Court for the Eastern District of California, at Fresno (hereinafter,

the "district court").

In 1974, Miller was enjoined by the District Court

". . . from, directly or indirectly, individually or in concert or in participation with others, performing transportation of property for compensation on public highways by motor vehicle, unless there is in force with respect to said transportation a certificate of public convenience and necessity, permit, license, or other form of authority issued by the [ICC] authorizing such transportation where such authority is required."

The language of the injunction repeated practically verbatim the language of §203(c) of the Interstate Commerce Act, 49 U.S.C. §303(c).

In 1976, the United States of America (hereinafter, the "government") filed an information for criminal contempt, charging Miller with 21 instances of illegal transportation.

Thereafter, Miller filed motions to dismiss the information based upon various statutory and constitutional grounds. The motions were denied by the district court.

Thereafter, to preserve a right of appeal on the statutory and constitutional issues raised by his motions, Miller entered into a Waiver and Stipulation of Fact with respect to Counts 1, 18 and 19 of the information. The Waiver and Stipulation of Facts was received by the court, who stated that the stipulation "in effect, constitute[d] an admission to the violation." The district court at no time personally addressed the defendant to inquire into the various categories of information set forth in Rule 11, Federal Rules of Criminal Procedure. At sentencing,

Miller's counsel referred to the Waiver and Stipulation of Fact as a "plea of nolo contendere."

Upon the conviction of Miller on Counts 1, 18 and 19, the government requested the court to dismiss the remaining counts, which were so dismissed.

A presentence report was supplied to the district court by the probation office. On advice of counsel, Miller made no statement to the probation officer. The presentence report contained uncorroborated allegations by the Interstate Commerce Commission of additional serious criminal activity.

On the date of sentencing, Miller's counsel denied the allegations contained in the presentence report. The district

court did not require the government to corroborate the allegation in the presentence report of wide-spread serious criminal activity.

Count 1 alleged one incident of illegal transportation for compensation in the amount of $1,484. The district court imposed one year imprisonment as to Count 1.

Count 18 alleged one incident of illegal transportation for compensation in the amount of $810. The district court imposed one year imprisonment, concurrent with the one year imprisonment under Count 1, as to Count 18.

Count 19 alleged one incident of illegal transportation for compensation in the amount of $1,240. The district

court imposed a committed fine in the sum of $100,000.

REASONS WHY THE WRIT SHOULD BE GRANTED

I

THE DISTRICT COURT AND NINTH CIRCUIT OPINIONS CONFLICT WITH BOYKIN v. ALBAMA, 398 U.S. 238 (1969), AND WITH OTHER CIRCUIT COURT DECISIONS.

Boykin v. Alabama, supra, set forth the constitutional mandate for the prophylactic provisions of Rule 11, Federal Rules of Criminal Procedure. Boykin describes a guilty plea as follows:

> "A plea of guilty is more than a voluntary confession made in open court, it also serves as a stipulation that no proof by the prosecution need be advanced. . . . It supplies both evidence and

verdict, ending controversy." 395 U.S. 238, 243-44 (1969)

As the district judge acknowledged on the record, the waiver and stipulation of facts filed in this case was essentially a plea of guilty. The Ninth Circuit's opinion in this case argues that difficulties may present themselves to district courts in determining whether a stipulation of fact is tantamount to a guilty plea, triggering Rule 11. Those difficulties were not presented in this case. The district court spontaneously remarked that the stipulation of facts was essentially a plea of guilty. The failure to comply with Rule 11 is presumptively prejudicial to the defendant. McCarthy v. United States, 394 U.S. 459, 468, 89 S.Ct. 1166, 1172, 22 L.Ed. 2d 418 (1969). See citations at United States v. Terrack, 515 F.2d 558, 563 (9th Cir. 1975) (Ely, C.J., dissenting).

Furthermore, it should have been apparent to the district court that the Waiver and Stipulation of Facts was the result of a plea bargain by which the remaining counts would be dismissed. The Ninth Circuit's opinion asserts that the District Court, in sentencing Miller, could consider the dismissed counts. If this is correct, the district judge, in conformance with Rule 11, should have been apprised of the plea bargain, and should have determined Miller's understanding of the plea bargain (whether the dismissed counts could still be considered by the court in imposing sentence).

As pointed out by District Judge Bazelon in United States v. Dorsey, 449 F.2d 1104 at 1108(n.18), defendants like Miller unwittingly lose their Boykin

rights in order to preserve other constitutional rights as issues on appeal. See 1 Wright, Federal Practice and Procedure, §175 at 382 (1969). The Ninth Circuit's decision below, and in United States v. Terrack, 515 F.2d 558 (1975), forces an election of constitutional rights by defendants like Miller who stipulate to the substantive facts, but do not plead guilty or nolo contendere, in order to preserve other constitutional issues for appeal.

As a result, the Ninth Circuit's decision below eviscerates the constitutional rights asserted by this Court in Boykin, and forces defendants to make unwitting elections of constitutional rights. The Ninth Circuit's decision conflicts with Boykin, and with Rucker v. United States, 290 F.2d 623

(D.C. Cir. 1960) and with Julian v. United States, 236 F.2d 155 (6th Cir. 1956).

II

THE DISTRICT COURT'S ACCEPTANCE OF UNCORROBORATED HEARSAY IN THE PRESENTENCE REPORT CONTRAVENES UNITED STATES v. TUCKER, 404 U.S. 443 (1972) AND LOPER v. BETO, 405 U.S. 473 (1972).

The Ninth Circuit's own decision in United States v. Weston, 448 F.2d 626 (9th Cir. 1971) established the constitutional deficiency of sentencing based upon uncorroborated hearsay allegations in a presentence report of additional serious criminal conduct by the sentenced defendant.

The Ninth Circuit's decision struggled, but failed to distinguish, the instant case from Weston. The majority opinion states that the district judge had sufficient proper evidence upon which to base the sentence and fine:

(1) The allegations of the complaint in the prior action in which a default judgment was entered against Miller;

(2) The allegations contained in the information in the instant criminal contempt proceeding; and

(3) Miller's stipulation to three counts.

However, to permit a court to rely upon allegations contained in a civil

injunction proceeding concluded by default would run counter to the well-established principle that conviction obtained without representation by counsel may not be relied upon in sentencing. United States v. Tucker, supra. Use of the civil default injunction against Miller is tantamount to enhancement of a sentence based upon a conviction obtained without advice of counsel. Loper v. Beto, supra. The reliability of a civil default injunction for purposes of fixing sentence is suspect.

As for the unproved counts in the information which were dismissed in accordance with the plea bargain, reliance upon these counts for sentencing purposes would stand due process on its head by transforming bare allegations in

an information into proven facts and placing on defendants the burden of disproving them at the time of sentencing.

The concurring opinion of Browning points to the statement of Miller's trial counsel that a $35.000 to $50,000 fine would be totally adequate.

However, the combination of the three counts to which Miller stipulated, and the indication by Miller's attorney of an adequate fine in the amount of $35,000 - $50,000 do not support the imposed committed fine of $100,000, and the imposed sentence of one year in prison (concurrent, on two counts). Quite obviously, the district judge looked to other factors to "enhance" the sentence.

The record indicates that the district judge relied on the uncorroborated hearsay statements in the presentence report in imposing sentence. The district judge stated:

> "I would like to take the profit out of [Miller's] illegal activities so maybe he wouldn't engage in it any more; although I understand he's continuing to do business even today illegally." (Emphasis Added)

In essence, Miller was subjected to a second trial in which he was accused of wide-spread illegal trucking activities, notwithstanding the dismissal of all but three counts of the information, and notwithstanding the fact that the presentence report consisted of uncorroborated hearsay statements. Judge Browning's concurring opinion points out that here, as in Weston, a criminal defendant cannot be required to bear the burden of disproving unsupported allegations of more wide-spread unlawful acti-

vities of the kind of which the defendant was accused and found guilty.

The Circuit Court's approval of the district court's enhancement of sentencing raises an important question of federal law which has not been, but should be, settled by the Supreme Court. Until settled, prosecutors in effect will shift the burden of proof in criminal trials to defendants in contravention of the Fifth and Sixth Amendments of the United States Constitution.

III

THE DISTRICT COURT ABUSED ITS DISCRETION IN IMPOSING THE FINE AND IMPRISONMENT, IN LIGHT OF THE SUBSTANTIVE OFFENSE PUNISHABLE ONLY BY

A $500 FINE, AND NOT BY IMPRISONMENT.

The Ninth Circuit's opinion frees the district court's sentencing power in contempt cases from any reference whatsoever to penalties provided in statutes for identical conduct. §222(a) of the Interstate Commerce Act, 49 U.S.C. §322(a) establishes a maximum $500 fine per incident for knowing and willful violations of the certification provisions of Part II of the Interstate Commerce Act.

The Ninth Circuit's Opinion renders the words in 18 U.S.C. §402,"prevailing usages at law", to annullity. The Eighth Amendment prohibits excessive fines and cruel and unusual punishments. While it is true that district courts' contempt

sentencing powers are broad, they are circumscribed by the Eighth Amendment. The district court's disregard of the congressional indication of the seriousness of Miller's conduct resulted in the imposition of an unconstitutional sentence and fine.

The petition filed in United States v. Quade, 563 F.2d 375 (8th Cir. 1977), cert. denied, 46 U.S.L.W. 3526 (U.S. February 21, 1978) involved similar, but not identical issues. It was not argued there, as is argued here, that the explicit language of 18 U.S.C. §402 ("prevailing usages at law") refers the district courts to the statutory penalties provided by Congress for similar or identical offenses. Even if the district court is not limited to the statutory penalties provided by Congress, the statutory

penalties should at least provide a gauge against which reviewing courts may determine whether or not the punishment is excessive. See, Mitchell v. Fiore, 470 F.2d 1149, at 1155, et seq. (3rd Cir. 1972) (Aldisert, C. J., dissenting), cert. denied, 411 U.S. 938 (1973).

Petitioner submits that review of the Ninth Circuit's decision is a necessary exercise of the Supreme Court's power of supervision over the federal courts in their exercise of the broad federal criminal contempt powers.

IV

THE DISTRICT COURT IMPROPERLY IMPOSED BOTH FINE AND SENTENCE FOR A CONTINUING COURSE OF CONDUCT.

The district court's power to punish for contempt under Title 18 U.S.C. §401 is limited to imprisonment or fine but not both. In re Bradley, 318 U.S. 50, 87 L.Ed. 608 (1943).

As argued above, the district court imposed the sentence and fine on Miller for engaging in a course of conduct, and the sentence is illegal.

CONCLUSION

Based upon the foregoing, petitioner respectively prays that the Supreme Court issue its Writ of Certiorari directed to the Ninth Circuit Court of Appeals in the above-captioned case.

DATED: February 1, 1979.

Respectfully submitted,

HERTZBERG, KOSLOW & FRANZEN

By: DAVID S. KOSLOW, Esq.
Attorneys for Petitioner
LAWRENCE VICTOR MILLER aka
LARRY MILLER

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) SS.
COUNTY OF LOS ANGELES)

AFFIDAVIT OF SERVICE BY
MAIL BY ATTORNEY

I, DAVID S. KOSLOW, ESQ. being first duly sworn, depose and state:

That I am and was at all times herein mentioned a citizen of the United States, employed in the County aforesaid, and over the age of 18 years; I further say that I am an active member of the State Bar of California, admitted to practice before the Supreme Court of the United States of California, a member of Hertzberg, Koslow & Franzen, attorneys of record in this case, and am not a party thereto.

My business address is 3550 Wilshire Boulevard, Suite 1418, Los Angeles, California 90010.

That on February 1, 1979, I served the within PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit on the interested parties in said action by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid, in the United States mail at 3550 Wilshire Boulevard, Los Angeles, California 90010, addressed as follows:

Dwayne Keyes, Esq.
United States Attorney
James E. White, Esq.
Assistant United States Attorney
5311 Federal Building
1130 "O" Street
Fresno, California 93721

Clerk, U.S. Court of Appeals
for the Ninth Circuit
U.S. Court of Appeals &
Post Office Building
7th & Mission Streets
P. O. Box 547
San Francisco, California 94101

Clerk, U.S. District Court,
Eastern District of California
The Honorable N. D. Crocker,
District Judge
650 Capitol Mall
Sacramento, California 95814

DAVID S. KOSLOW

Subscribed and sworn to before me this 1st day of February, 1979.

Notary Public in and for Said County and State